

**Introduced by Senator Alquist**February 18, 2005

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An act to amend Section 311 of the Penal Code, relating to obscene matter.

## LEGISLATIVE COUNSEL'S DIGEST

SB 478, as introduced, Alquist. Obscene matter: definition.

Existing law provides for the definition of "obscene matter," which is matter, taken as a whole, that to the average person applying contemporary statewide standards, appeals to the prurient interest, that, taken as a whole, depicts, or describes sexual conduct in a patently offensive way, and that taken as a whole, lacks serious literary, artistic, political, or scientific value. Further, existing law provides other considerations that are to be weighed in determining whether materials are "obscene matter" and defines various other terms that determine whether the law has been violated when "obscene matter" is viewed, distributed, engaged in, or exhibited.

This bill would make a technical, nonsubstantive change to this provision.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

- 1 SECTION 1. Section 311 of the Penal Code is amended to
- 2 read:
- 3 311. As used in this chapter, the following definitions *will*
- 4 apply:
- 5 (a) "Obscene matter" means matter, taken as a whole, that to
- 6 the average person, applying contemporary statewide standards,

1 appeals to the prurient interest, that, taken as a whole, depicts or  
2 describes sexual conduct in a patently offensive way, and that,  
3 taken as a whole, lacks serious literary, artistic, political, or  
4 scientific value.

5 (1) If it appears from the nature of the matter or the  
6 circumstances of its dissemination, distribution, or exhibition that  
7 it is designed for clearly defined deviant sexual groups, the  
8 appeal of the matter shall be judged with reference to its intended  
9 recipient group.

10 (2) In prosecutions under this chapter, if circumstances of  
11 production, presentation, sale, dissemination, distribution, or  
12 publicity indicate that matter is being commercially exploited by  
13 the defendant for the sake of its prurient appeal, this evidence is  
14 probative with respect to the nature of the matter and may justify  
15 the conclusion that the matter lacks serious literary, artistic,  
16 political, or scientific value.

17 (3) In determining whether the matter taken as a whole lacks  
18 serious literary, artistic, political, or scientific value in  
19 description or representation of those matters, the fact that the  
20 defendant knew that the matter depicts persons under the age of  
21 16 years engaged in sexual conduct, as defined in subdivision ~~(c)~~  
22 *(d)* of Section 311.4, is a factor that may be considered in making  
23 that determination.

24 (b) “Matter” means any book, magazine, newspaper, or other  
25 printed or written material, or any picture, drawing, photograph,  
26 motion picture, or other pictorial representation, or any statue or  
27 other figure, or any recording, transcription, or mechanical,  
28 chemical, or electrical reproduction, or any other article,  
29 equipment, machine, or material. “Matter” also means live or  
30 recorded telephone messages if transmitted, disseminated, or  
31 distributed as part of a commercial transaction.

32 (c) “Person” means any individual, partnership, firm,  
33 association, corporation, limited liability company, or other legal  
34 entity.

35 (d) “Distribute” means transfer possession of, whether with or  
36 without consideration.

37 (e) “Knowingly” means being aware of the character of the  
38 matter or live conduct.

39 (f) “Exhibit” means show.

(g) “Obscene live conduct” means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, taken as a whole, that to the average person, applying contemporary statewide standards, appeals to the prurient interest and is conduct that, taken as a whole, depicts or describes sexual conduct in a patently offensive way and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(1) If it appears from the nature of the conduct or the circumstances of its production, presentation, or exhibition that it is designed for clearly defined deviant sexual groups, the appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, if circumstances of production, presentation, advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, that evidence is probative with respect to the nature of the conduct and may justify the conclusion that the conduct lacks serious literary, artistic, political, or scientific value.

(3) In determining whether the live conduct taken as a whole lacks serious literary, artistic, political, or scientific value in description or representation of those matters, the fact that the defendant knew that the live conduct depicts persons under the age of 16 years engaged in sexual conduct, as defined in subdivision (e) (d) of Section 311.4, is a factor that may be considered in making that determination.

(h) The Legislature expresses its approval of the holding of *People v. Cantrell*, 7 Cal. App. 4th 523, that, for the purposes of this chapter, matter that “depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct” is limited to visual works that depict that conduct.